STATE OF MICHIGAN

COURT OF APPEALS

DAVE COLE DECORATORS, INC., Plaintiff-Appellant,	UNPUBLISHED March 25, 2014
v	No. 313641 Kent Circuit Court
WESTFIELD INSURANCE COMPANY, Defendant-Appellee.	LC No. 12-004808-CK

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

The circuit court summarily dismissed plaintiff Dave Cole Decorators, Inc. (DCD)'s breach of contract action against its commercial general liability insurer, Westfield Insurance Company. The damages for which DCD sought coverage did not arise from an "occurrence" under its insurance policy. We therefore affirm.

I. BACKGROUND

A. J. Veneklasen hired DCD to paint the steel components of a building that was under construction. DCD contracted the work out to a third party. Veneklasen later notified DCD that the paint did not properly adhere to the steel, causing some components to rust and the drywall installed over the steel to "pop." DCD repainted the defective areas at a cost of $28,617. It did not repair the damaged steel and drywall or pay for those repairs.

DCD subsequently submitted a claim to Westfield for reimbursement of its costs for the repainting job. Westfield denied the claim and DCD filed suit. The circuit court summarily dismissed DCD's claim, ruling that because DCD failed to adequately prove damage to anything other than its own defective work product, no "occurrence" existed under the policy terms and Michigan law. In the alternative, the circuit court found that coverage would be precluded by several exclusionary provisions in the policy. This appeal followed.

II. ANALYSIS

We review de novo a circuit court's decision on a motion for summary disposition. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Id*. In relation to a (C)(10) motion, we must consider the evidence in the light most favorable to the nonmoving

party. *Id*. "Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

We also review de novo issues of contract interpretation. *American Home Assurance Co v Mich Catastrophic Claims Ass'n*, 288 Mich App 706, 717; 795 NW2d 172 (2010). When determining the parties' rights under a contract, a court is to read the contract as a whole and give meaning to all the terms contained within the policy. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 138-139; 610 NW2d 272 (2000). A court may not create an ambiguity in a policy if the terms are clear and unambiguous. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 83; 730 NW2d 682 (2007).

The Westfield policy issued to DCD provides, in relevant part:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies . . .
>
> **b.** This insurance applies to "bodily injury" and "property damage" only if:
>
> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"

The policy defines an "occurrence" as "an accident," but does not define the term "accident." This Court analyzed nearly identical commercial general liability insurance policy language defining a covered "occurrence" as an "accident" in *Radenbaugh*, 240 Mich App 134. "[A]n accident," *Radenbaugh* explained, "is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Id.* at 147 (quotation marks and citations omitted). A covered accident is found "when an insured's defective workmanship results in damage to the property of others." "When the damage . . . is confined to the insured's own work product the insured is the injured party, and the damage cannot be viewed as accidental . . . ." *Id.* (quotation marks and citations omitted). See also *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369, 378; 460 NW2d 329 (1990).

DCD does not dispute the applicable law. Instead, it argues that the circuit court failed to give adequate consideration to the evidence of rusting and drywall "popping" that occurred to the building as a result of the defective paint job. DCD asserts that this represents "damage to the property of others," sufficient to constitute an "occurrence." It is undisputed that DCD incurred no additional costs in relation to the damage to Veneklasen's property, however. The record is devoid of evidence or allegations that DCD replaced any steel beams or drywall or paid for those

repairs. There is no indication that Veneklasen ever filed suit against DCD to recover for these damages. Because there were no "damages beyond the mere diminution in value of the insured's product caused by alleged defective workmanship," *Radenbaugh*, 240 Mich App at 141, no "occurrence" existed and Westfield was not obligated to reimburse DCD for the cost of repainting.

DCD alternatively suggests that a separate policy provision—the "products/completed operations aggregate limit"—affords coverage for the costs incurred in repainting. This provision merely sets forth the highest limit of insurance under the policy. It applies only if there is a covered occurrence as defined elsewhere in the policy. As the defective paint job was not an "occurrence" under the policy, the "aggregate limit" provision was not triggered.[1]

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

[1] As no covered occurrence was present in this case, we need not consider the circuit court's alternate ruling that coverage could have been denied based on an exclusionary provision in the policy.